

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33988

STATE OF IDAHO,)	2008 Unpublished Opinion No. 612
)	
Plaintiff-Respondent,)	Filed: August 21, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
MARK E. MISER,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Power County. Hon. N. Randy Smith, District Judge.

Order denying motion to withdraw plea of guilty to possession of a controlled substance, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

WALTERS, Judge Pro Tem

This is an appeal from an order denying a motion to withdraw a plea of guilty. We affirm.

I.

BACKGROUND

The appellant, Mark E. Miser, was charged with possession of a controlled substance (methamphetamine), I.C. § 37-2732(c)(1), and with being a persistent violator, I.C. § 19-2514. During a jury trial on the charges and after the state had rested its case, Miser decided to forego finishing the jury trial. He pled guilty to the controlled substance charge and admitted to the persistent violator allegation. His plea was entered pursuant to an agreement under Idaho Criminal Rule 11 whereby the state would recommend, and the district court would impose, a unified sentence of twelve years, with five years fixed. Miser completed a written guilty plea

questionnaire, submitted it to the district court and engaged in an extensive colloquy with the court concerning his reasons for entering the plea. The court accepted Miser's guilty plea and scheduled a sentencing hearing for a later date.

After a presentence report had been prepared and submitted, Miser moved to withdraw his guilty plea. The motion was filed about a week before the sentencing hearing. The motion was addressed at the sentencing hearing and was denied by the district court. After entry of the judgment of conviction, Miser appealed. He contends that the district court abused its discretion in denying the motion to withdraw plea.

II.

STANDARD OF REVIEW

Appellate review of the denial of a motion to withdraw a plea is limited to determining whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *State v. Moon*, 140 Idaho 609, 610, 97 P.3d 476, 477 (Ct. App. 2004); *State v. Ward*, 135 Idaho 68, 71, 14 P.3d 388, 391 (Ct. App. 2000). The movant has the burden to show that the withdrawal should be allowed, *State v. Carrasco*, 117 Idaho 295, 298, 787 P.2d 281, 284 (1990), and a denial order will not be reversed absent an abuse of discretion. *State v. Lavy*, 121 Idaho 842, 844, 828 P.2d 871, 873 (1992). When a district court's discretionary decision in a criminal case is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *State v. McFarland*, 130 Idaho, 358, 362, 941 P.2d 330, 334, (Ct. App. 1997) citing *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

III.

DISCUSSION

Idaho Criminal Rule 33 allows a defendant to move to withdraw a plea of guilty before sentence is imposed. When such a motion is made, the defendant must present a just reason for withdrawing the plea. *State v. Ballard*, 114 Idaho 799, 801, 761 P.2d 1151, 1153 (1988). It is well settled that "withdrawal of a presentence guilty plea is not an automatic right and the defendant has the burden of proving that the plea should be allowed to be withdrawn." *State v. Dopp*, 124 Idaho 481, 485, 861 P.2d 51, 55 (1993).

In his motion to withdraw the plea, and at the hearing on the motion which was held at the time scheduled for sentencing, Miser asserted several reasons why his motion should be granted. He claimed that because his attorney had not reduced the plea agreement to writing, his plea was not voluntarily given because he was improperly informed of the minimum and maximum penalties as a consequence of his plea; that his attorney had lied to him and led him to believe that he would receive a fixed sentence of fifteen years if he did not plead guilty; that he was incorrectly informed that the district court would not be bound by any promises or recommendations from either party as to punishment; and that his attorney failed to raise a number of issues during the trial that Miser wished to raise.

The district court engaged in an extensive dialogue with Miser concerning Miser's allegations. The court reviewed the record, including the guilty plea questionnaire made at the time Miser's plea had been accepted by the court. That record showed that Miser was fully apprised of his rights and understood the consequences of his plea. Consequently, the court determined that Miser's plea had been made knowingly and voluntarily. The court further determined that it would be bound by the plea agreement and the fact that the agreement was not reduced to writing was not relevant because Miser would receive exactly the sentence that had been bargained for. Finally, the court found Miser's contentions that his attorney did not properly advise him or represent him at trial related to actions of the attorney that preceded the entry of the guilty plea and were matters that were waived by the entry of the plea of guilty. Accordingly, the district court concluded that Miser had not raised a reason sufficient to allow withdrawal of the plea.

Upon review of the record, we hold that the district court recognized that its authority to grant Miser's motion to withdraw his guilty plea was a discretionary decision under I.C.R. 33; that the court acted within the boundaries of its discretion and consistent with applicable legal standards in reaching its decision; and that it reached its decision by an exercise of reason when it determined to deny Miser's motion. Because Miser did not show a just reason, the district court did not abuse its discretion in denying Miser's motion to withdraw plea.

IV.

CONCLUSION

The order denying Miser's motion to withdraw his guilty plea is affirmed.

Judge LANSING and Judge PERRY **CONCUR.**